

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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MICHAEL ROCK,

Plaintiff,

v.

Civil Action No.  
8:14-CV-0212 (DEP)

CAROLYN W. COLVIN, Commissioner  
of Social Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

SCHNEIDER LAW FIRM  
57 Court Street  
Plattsburgh, New York 12901

MARK A. SCHNEIDER, ESQ.

FOR DEFENDANT

HON. RICHARD S. HARTUNIAN  
United States Attorney  
P.O. Box 7198  
100 S. Clinton Street  
Syracuse, NY 13261-7198

JOSHUA L. KERSHNER, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on November 8, 2013, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

1) Defendant's motion for judgment on the pleadings is  
GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: November 11, 2014  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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MICHAEL ROCK,

vs.

14-CV-212

COMMISSIONER OF SOCIAL SECURITY.  
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Transcript of *DECISION* held on November 7, 2014,  
at the James Hanley U.S. Courthouse, 100 South Clinton Street,  
Syracuse, New York, the HONORABLE DAVID E. PEEBLES, Presiding.

A P P E A R A N C E S

For Plaintiff:  
(Via Telephone)

MARK A. SCHNEIDER, ESQ.  
57 Court Street  
Plattsburgh, New York 12901

For Defendant:  
(Via Telephone)

SOCIAL SECURITY ADMINISTRATION  
Office of Regional General Counsel  
Region II  
26 Federal Plaza - Room 3904  
New York, New York 10278  
BY: JOSHUA L. KERSHNER, ESQ.

1 (In chambers, via telephone:)

2 THE COURT: I have before me a request for judicial  
3 review pursuant to 42, United States Code, Section 405(g) of  
4 an adverse determination of the Commissioner.

5 The plaintiff's background is as follows: He was  
6 born in February 1990. He is currently 24 years of age. If  
7 my math serves me correctly, he was 22 years old at the time  
8 of the hearing in this matter. At the time of the hearing,  
9 he was married with two children ages five and one. There is  
10 some conflict in the record as to where he lives. At the  
11 hearing he testified he lives with his grandparents. That's  
12 at Page 48 of the administrative transcript. He told  
13 Dr. Liotta that he lives with his wife's parents. That's at  
14 Page 608 of the administrative transcript.

15 He has a tenth grade education. While in school he  
16 was in special education classes with the notation of a  
17 previous diagnosis of attention disorder, hyperactivity  
18 disorder or ADHD. He did not achieve a GED degree.

19 He last worked in or about June of 2010. His prior  
20 work includes packing plastic bottles, remodeling, roofing,  
21 delivering water and being involved in Christmas tree sales  
22 and working at a fast food restaurant.

23 He suffers from many issues including anxiety. He  
24 has complained over time of pinched nerves in his neck and  
25 shoulders causing pain, stomach bulge, decreased vision,

1 right knee and right ankle pain, a bad heart, daily  
2 headaches, dizziness and vertigo.

3           Procedurally, he applied on September 30th, 2010,  
4 for supplemental security income or SSI benefits alleging an  
5 onset date of June 1, 2010. A hearing was conducted by  
6 Administrative Law Judge Robert Wright on May 4, 2012. ALJ  
7 Wright issued a decision on June 14, 2012. The Social  
8 Security Administration Appeals Council denied review of the  
9 decision on May 11, 2013, making the ALJ's decision a final  
10 determination of the agency.

11           In his decision, ALJ Wright concluded that  
12 plaintiff had not engaged in substantial gainful activity  
13 since his alleged onset date, that he had severe impairments  
14 at Step 2, including mild to moderate amount of denervation  
15 potentials in left C5 distribution, as well as anxiety and a  
16 history of ADHD.

17           The ALJ concluded, however, that the plaintiff did  
18 not meet or medically equal any of the listings. He  
19 considered, specifically, Listings 12.02, 12.04 and 12.06.  
20 He specifically found in connection with the B criteria  
21 associated with 12.06, that the plaintiff suffered from only  
22 mild limitations in the activity of daily living; moderate in  
23 social functioning; and moderate limitation in concentration,  
24 persistence and pace.

25           He next concluded that, despite his conditions,

1 plaintiff retains the residual functional capacity, or RFC,  
2 to perform light work, except he can perform simple and  
3 routine work with a specific vocational preparation of one or  
4 two and only occasional decision-making, changes in work  
5 setting and interaction with others.

6 The ALJ then went on to find that plaintiff is  
7 incapable of performing his past relevant work and applied  
8 the grids as a framework, noted that Rule 202.17 of the grids  
9 would indicate a no disability finding. However, finding  
10 that the job base on which the grids were predicated was  
11 sufficiently eroded by non-exertional limitations  
12 experienced, elicited testimony from a vocational expert who  
13 concluded that there were jobs in the national and regional  
14 economy that plaintiff was capable of performing.

15 My review is limited. I am tasked with determining  
16 whether the ALJ applied proper legal principles and his  
17 determination is supported by substantial evidence. The term  
18 "substantial evidence" being defined as such relevant  
19 evidence as a reasonable mind might accept as adequate to  
20 support a conclusion.

21 The first issue raised is whether plaintiff meets  
22 or medically equals any of the listings, particularly  
23 listings 12.06 applicable to anxiety disorders or 12.07  
24 related to somatoform disorders. In both of those cases, the  
25 plaintiff must meet the B listings, meaning he must

1 demonstrate his burden of proof that he suffers from marked  
2 limitations in two of the three categories or, obviously,  
3 repeated episodes of decompensation, which is not at issue in  
4 this case, or an extreme limitation of one.

5           There doesn't seem to be any indication that there  
6 is an extreme limitation, which is an impairment that  
7 interferes very seriously with the claimant's ability to  
8 independently initiate, sustain or complete activities. A  
9 marked limitation is defined in the regulations as one which  
10 impairs seriously with the claimant's ability to  
11 independently initiate, sustain or complete activities. It  
12 is noted that a marked limitation may arise when several  
13 activities or functions are impaired or even when only one is  
14 impaired, as long as the degree of limitation is such as to  
15 interfere seriously with the ability to function based on age  
16 appropriate expectations, independently, appropriately,  
17 effectively and on a sustained basis.

18           I find that the ALJ's determination regarding the B  
19 criteria is supported by substantial evidence. Very clearly,  
20 the ALJ misspoke when he concluded that Dr. Liotta had ruled  
21 out somatoform disorder. Nonetheless, I find that that's a  
22 harmless error because somatoform disorder, which has never  
23 been diagnosed by any treating source, to meet or equal 12.07  
24 requires meeting the B criteria, which the ALJ concluded that  
25 he did not when he considered 12.06.



1           The only evidence that would even suggest a marked  
2           limitation is the GAF score of 42. Dr. Marks concluded that  
3           plaintiff at 412 has a moderate limitation in concentration,  
4           persistence and pace, moderate limitation in social  
5           functioning and a mild limitation in daily activities --  
6           daily living. These determinations are supported by  
7           Dr. Hartman's conclusions and Dr. Liotta.

8           I reviewed Mr. Schneider's case citations that deal  
9           with differences of opinions between Dr. Liotta and  
10          Dr. Hartman. There apparently are several of those cases.  
11          But this case appears to be very different because, with the  
12          exception of the GAF 42 score, I read -- and the  
13          commissioner, the ALJ, read -- Dr. Liotta's report is  
14          basically consistent with or not markedly inconsistent with  
15          the conclusions of Dr. Hartman. So, I would say that because  
16          he did not meet the B criteria, that finding is supported by  
17          substantial evidence. That issue does not warrant reversal.

18          Clearly, as Mr. Schneider correctly states, the ALJ  
19          was required to consider the combination of plaintiff's  
20          physical and mental conditions -- and there are clearly  
21          several -- but the ALJ's decision, in my view, did consider  
22          the totality and his RFC determination is well-supported.  
23          The vocational expert testified at Step 5 pursuant to a  
24          hypothetical that replicated the RFC finding which I find is  
25          supported by substantial evidence and concluded no

1 disability.

2 I reviewed carefully the records to determine  
3 whether there was any cognitive deficit. Clearly, there was  
4 a reference in Dr. Hartman's, I believe, report to rule out  
5 borderline intellectual functioning but there's no medical  
6 evidence to suggest that he suffers from borderline  
7 intellectual functioning. It was never alleged and  
8 Dr. Marks, I will note, did review the school records that  
9 were relied on to support a claim of learning disability and  
10 borderline intellectual functioning. I'll also note that  
11 Mr. Liotta made no diagnosis of learning disability. He made  
12 no Axis II diagnosis in his report.

13 In terms of credibility, that is a matter reserved  
14 to the administrative law judge, provided that he considers  
15 the relevant factors and explains his decision, which I find  
16 that he did. He noted several issues with regard to  
17 plaintiff's credibility: His overblown claim concerning his  
18 vision impairment; his inconsistent statements about the  
19 frequency of playing video games; his inconsistency in  
20 stating that he is unable to sit when, in fact, his  
21 disability report made no indication in that regard. It was  
22 for the ALJ to weigh credibility and I find that his  
23 explanation is adequate and supported.

24 I've already spoken about Dr. Liotta versus  
25 Dr. Hartman. The GAF, I agree with the Commissioner and the

1 Commissioner's argument. GAF is of limited value. Certainly  
2 a person with a GAF score of 42 experiences serious symptoms  
3 such as suicidal ideation, severe obsession, rituals and  
4 frequent shoplifting, and any serious impairment in social  
5 occupational or school functioning, such as lack of friends  
6 or an inability to maintain employment.

7 But Dr. Liotta's GAF score is based exclusively on  
8 plaintiff's own statements and is a single determination  
9 based on only one examination. The ALJ was certainly  
10 obligated to address that and he did and I don't have any  
11 quarrel with his ability to discount that in light of the  
12 overall record.

13 In terms of reliance on lack of treatment, that  
14 seems to be a fairly minor point and, as I indicated  
15 previously, I think it is a relevant consideration, as long  
16 as it isn't the sole basis for the determination. The  
17 section cited, 20 CFR Section 416.930 seems to relate to a  
18 situation where there is a disability. There's a clear  
19 indication that a prescribed treatment could ameliorate or  
20 eliminate the disability and the plaintiff fails to follow  
21 that treatment. We don't really have that situation here.

22 So, for all of those reasons, I find that the  
23 Commissioner's determination is supported by substantial  
24 evidence and resulted from proper legal principles being  
25 applied. I will, therefore, grant defendant's motion for

1 judgment on the pleadings.

2 I appreciate excellent submissions. This was an  
3 interesting and difficult case, frankly. Thank you both.

4 MR. SCHNEIDER: Thank you.

5 (Proceedings were adjourned.)  
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C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional Reporter, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, that the foregoing is a true and correct copy of same and the whole thereof.

*Diane Martens*

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DIANE S. MARTENS, FCRR